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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR PETITIONER.

ROYAL W. IRWIN,
Attorney for Petitioner.

ROYAL W. IRWIN,
29 South La Salle Street,
Chicago 3, Illinois.

THE DUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

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BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

Petitioner, Alfred S. Penn (plaintiff below) brought an action against Respondent (defendant below) for damages sustained from personal injuries alleged to have resulted from a violation of the Federal Safety Appliance Acts.

It was alleged in the complaint that the defendant unlawfully equipped and maintained a defective coupler on a freight car in that the same could not be uncoupled by means of a pin lifter, contrary to the provisions of the Federal Safety Appliance Acts.

The case was tried in the District Court and resulted in a judgment in favor of the plaintiff for $15,000.

An appeal was taken by the defendant to the Circuit Court of Appeals for the Seventh Circuit, which Court reversed the judgment and remanded the case to the District Court with directions to enter judgment for the defendant.

This Court granted the plaintiff's Petition for Certiorari, and the case is here for argument upon the merits.

The case is reported in 163 Fed. (2d) 995.

PROPOSITIONS OF LAW RELIED UPON.

Safety Appliance Acts.

It shall be unlawful for any common carrier to permit to be used any car not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U. S. C. A. 18.

Roberts Federal Liabilities of Carriers, Vol. 2, 2nd Edition, 1213.

A coupling appliance will be regarded as defective if there is proof that the mechanism failed to work efficiently.

Myers v. *Reading*, 331 U. S. 477.

Chicago, Rock Island & Pac. Ry. Co. v. *Brown*, 229 U. S. 317.

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. *Popplar*, 237 U. S. 369.

The duty to provide safe couplers and the liability for failure to do so are absolute.

St. Joseph & G. I. R. R. Co. v. *Moore*, 243 U. S. 311.

The principle of *res ipsa loquitur* applies in cases involving a violation of the Safety Appliance Acts.

Minneapolis & St. Paul R. R. Co. v. *Gottschall*, 244 U. S. 66.

Questions of Fact for Jury.

The jury is the arbiter of facts in cases arising under the Federal Employers' Liability Act.

Ellis v. *Union Pacific R. R. Co.*, 329 U. S. 649.

Lavender v. *Kurn*, 327 U. S. 654.

Myers v. *Reading*, 331 U. S. 477.

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ARGUMENT.

Statement of Facts.

The plaintiff was a switchman employed by the defendant in switching cars in the Proviso Yard (Rec. 10). The defendant was engaged in classifying cars, and in doing that work it was the duty of the plaintiff to uncouple cars from the cut as they were being shoved along the tracks in order that the cars might be shunted onto various other tracks in the yard (Rec. 12).

At the time of the accident the defendant intended to shunt a car onto a switch track, and in order to do so the plaintiff stood upon the stirrup of the car to be cut off, to uncouple that car from the cut when it had attained sufficient momentum to carry it to its destination. It was necessary for the plaintiff to hold onto a grab iron with one hand, and while standing on the sill step reach over with the other hand and pull up on the pin lifter. It was claimed by the plaintiff that the pin lifter, when he attempted to lift it, did not uncouple the cars as it should have done, and, after making several attempts to uncouple the car by means of the pin lifter, the plaintiff got upon the ground and ran along beside the car, where he believed he could better accomplish the act. After making three or four attempts to uncouple the car by means of the pin lifter, he accidentally stepped into an opening in the roadbed between a tie and a switch rod and broke his leg. (Rec. 16.)

The pin lifter is a long horizontal rod with a handle at the outer end. It is connected with the knuckle in the coupler, and when it is lifted it uncouples the cars. (Rec. 14.)

What actually occurred is best expressed by the testimony of the plaintiff himself. The following appears on pages 15 and 16 of the record:

"Q. And when you got hold of this pin lifter on the outside end, what did you do to it?

"A. Whenever I got the slack, I made an effort to lift it.

"Mr. Irwin: Q. When you pulled on the pin lifter, what did it do?

"A. It did not function.

"Q. It did not function. What did you do then?

"A. I made another effort, a harder effort to get it.

"Q. How did you do it?

"A. I jerked harder.

"Q. What happened to the pin lifter then?

"A. Just like it was.

"Q. What did you do after that?

"A. I made about five or six efforts to get it, on the car.

"Q. You mean, while you were standing on the car?

"A. While I was standing on the car.

"Q. Did the pin lifter work while you were standing on the car?

"A. It did not.

"Q. You said you waited for the slack. What do you mean by that?

"A. Just as soon as they kick these cars, when all of the weight comes together, you can operate that pin. Otherwise you can't.

"Q. How far do the cars have to move before you can operate the pin?

"A. Just as soon as the slack comes in.

"Q. What is that?

"A. Just as soon as they come together.

"Q. Had they come together before you operated the pin or afterwards?

"A. They was together when I operated the pin.

"Q. When you tried to operate it?

"A. When I tried to operate it.

"Q. And did the pin lifter operate at that time?

"A. Not until after I got off the car.

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"Q. Should it have operated at that time?

"A. It should.

"Q. Well, I was wearing myself down making a stronger effort to try to get it. I thought if I could get off, it would be easier, and I could get it.

"Q. What did you do?

"A. I stepped off, and made three efforts.

"Q. And what happened to the pin?

"A. It come.

"Q. What happened to you?

"A. I went in a hole.

"Q. What hole?

"A. Between the ties.

"Q. At the time that the pin lifter came, at the time it operated, was that the first time that it operated?

"A. It was.

"Q. What did you do to make it operate?

"A. Three times I gave it all I had, after I got on the ground.

"Q. You mean while you were running along?

"A. Yes, sir.

"Mr. Irwin: Q. What did your foot go into?

"A. Between the rod, the tie rod and the tie." (Rec. 15, 16.)

The Circuit Court of Appeals reversed the judgment and remanded the cause with directions to grant the defendant's motion for a judgment in its favor notwithstanding the verdict. The Court in its opinion said:

> "It is not necessary to refer to other cases where it has been held that the failure of a coupler to operate is proof of a defective condition. Such cases are of little or no benefit to the plaintiff in the instant case where the coupler did operate when sufficient force was applied and when plaintiff was positioned so that such force became effective. It is plain, so we think, that he was not in a proper position to operate the coupler while stationed on the side of the car. Plaintiff recognized this situation and placed himself

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on the ground for the purpose of performing the operation. Although he states that he made the third attempt before he succeeded, it is evident that the coupler operated within a second or two after plaintiff had thus positioned himself. Certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect, and we think the fact that it operated so readily after he was properly positioned dispels any inference of defect that might arise from his previous unsuccessful efforts." (Rec. 211.)

Failure of Pin Lifter to Operate.

It was conceded by the Circuit Court of Appeals in its opinion that failure of a coupler to operate is proof of a defective condition. The only question is whether there was evidence in the record of a failure of the coupler to operate.

Cars can be uncoupled only when the slack is in. When the engine starts shoving the cars, the slack is in on all the drawbars. That releases the tension on the pin, and the pin puller can then lift the pin. After the coupling pin has been lifted and the cars uncoupled, the engineer shuts off the throttle and sets the brake, and thus the car cut off is permitted to roll away from the cut of cars. (Rec. 72.)

The plaintiff, while riding on the end of the car, made five or six attempts to uncouple the cars, but the pin lifter did not work. (Rec. 15.) The plaintiff was wearing himself down in his effort to lift the pin lifter, so he decided to get off onto the ground, where he believed he could get it. He stepped off, and while running along beside the cars made three efforts to uncouple the cars when he stepped into a hole, but just at that time the pin lifter operated for the first time. (Rec. 16.)

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The Circuit Court of Appeals erroneously found that "plaintiff mounted the car next to the car to be coupled" (Rec. 209), and "after having attempted to unsuccessfully operate the coupler from this awkward position he stepped upon the ground" (Rec. 209), also that "certainly the fact that it did not operate while he was awkwardly positioned on the car is no proof of defect." (Rec. 211.)

The testimony of the plaintiff was:

> "Q. Which car did you get on?
>
> "A. I got on the north—I got on the first car, the car that was supposed to be cut off." (Rec. 13.)

Thus it appears that the Circuit Court of Appeals has erroneously decided the case upon a false factual situation.

The plaintiff made five or six attempts to operate the pin lifter while riding on the car and three attempts while running along beside the car. The pin lifter failed to work, although the plaintiff said he had made every endeavor to operate it. It was not claimed upon the trial that the plaintiff was improperly positioned, or that he did not make a fair effort to operate the pin lifter. The Circuit Court of Appeals found that he was riding on the wrong car from which to operate the pin lifter. The fact is that plaintiff was on the other car. But that question was not raised. It makes no difference upon which car the switchman rides if he can reach the pin lifter and operate it.

Section 2 of Safety Appliance Acts.

This action is based upon Section 2 of the Safety Appliance Acts, which provides:

> "It shall be unlawful for any common carrier * * * to permit to be hauled or used * * * any car * * * not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.A. 18.)

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The law applicable to this case is best stated in Roberts Federal Liabilities of Carriers, Vol. 2, Second Edition, p. 1213:

> "If the condition of a coupler is such that the knuckles cannot be opened with the use of the pin lifter and that either of them must be opened with the use of the hand, the coupler is defective within the meaning of the statute as it will not couple automatically by impact."

The purpose of the Safety Appliance Acts was to make it unlawful to use any car not equipped with automatic couplers whereby cars can be coupled and uncoupled without the necessity of men going between the ends of the cars. The duty is absolute and does not depend upon care exercised by the Railroad Company.

The section of the statute providing for couplers is remedial in nature, and is to be given a construction that will effectuate its purposes.

The test of compliance with the requirements of the statute is the operating efficiency of the appliances with which the cars are equipped. It is not necessary to prove a defect in the coupler, but evidence of the failure of a coupler to operate efficiently is sufficient to constitute proof of a violation.

In the case of *Myers* v. *Reading*, 331 U. S. 477, 91 Law Ed. 1615, the Court said:

> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance."

Judgment was affirmed in *Chicago, Rock Island & Pacific Railway Co.* v. *Brown*, 229 U. S. 317, where a similar

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factual condition existed. It appears from the case that it was the duty of the plaintiff, a switchman, to uncouple a car in a moving cut. The Court said (pp. 320, 321):

> "The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance on the side of the car on which he was working at the time would not operate. He gave three or four jerks to it, which failed to open the coupler. He then reached in between the cars and attempted to lift the coupler with his fingers * * *. During all this time he was walking beside the cars, which were moving slowly * * *. As he was reaching for the coupler pin on this adjacent coupler, his foot slipped and a low brake beam, striking his foot, shoved him into an unblocked guard rail * * * and * * * this court settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, *no matter how slight the pull on the uncoupling lever.*" (Italics ours.)

In *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Popplar, Admr.*, 237 U. S. 369, 59 Law Ed. 1001, the action was brought to recover for the wrongful death of a brakeman resulting from an injury received by the decedent while attempting to uncouple a car which had been kicked to a siding. The Court said:

> "There was testimony that the decedent, on giving the stop signal, attempted to uncouple the 'head car' that was to be left to run of its own momentum on the siding; he tried repeatedly to do this by pulling the coupling pin with the lifter at the end of the next car, but without success, and then, stepping between the two cars, while they were moving at the rate of about 4 miles an hour, in order to effect the uncoupling by hand, he was run over and killed. The conductor, a witness for the company, who examined the coupling apparatus soon after the accident, testified that it worked with difficulty and that he would

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have reported it as a 'bad coupler' had it been brought to his attention. Without going into the evidence in detail, it is sufficient to say that we find no ground for reversal in the ruling that there was enough to go to the jury upon the question whether, in fact, the coupler was defective."

In the case of *St. Joseph & G. I. R. Co.* v. *Moore*, 243 U. S. 311, 61 Law Ed. 741, it appeared that the deceased was engaged in adjusting a defective automatic coupler on the rear end of the tender of an engine, which was started unexpectedly, causing him to be thrown from his feet by the steam hose equipment, which hung down to within a few inches of the surface of the track, whereby he was knocked down and run over, losing both hands. The action was based upon a violation of the Coupler Act. The Court said:

"The exercise of care, even the greatest, in supplying and repairing these appliances, will not excuse defects in them,—the duty and liability are absolute."

In the case of *Minneapolis & St. Paul R. R. Co.* v. *Gotschall, Admx.*, 244 U. S. 66, 61 Law Ed. 995, it appears that the deceased, the head brakeman on a freight train, was proceeding along the tops of the cars toward the locomotive when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk, which threw the deceased from the train. The jury, under an instruction of the Court, was permitted to infer negligence from the fact that the coupler failed to perform its function.

The Court held that the principle of *res ipsa loquitur* applied in view of the positive duty imposed by the statute upon the Railroad to furnish safe appliances for the coupling of cars.

The rule was long ago laid down that the scope and effect

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of the Safety Appliance Acts are not now open to further discussion (*Chicago Burlington & Quincy Ry. Co.* v. *U. S.*, 220 U. S. 559).

Questions of Fact for Jury.

The Court assumed the position of jury. It attempted to weigh the evidence, and found that the plaintiff was negligent in the position he assumed.

The evidence clearly indicates that the coupler was defective in that it failed to operate after eight or nine attempts.

Even if the plaintiff had been guilty of contributory negligence, the Federal Acts provide that contributory negligence is not a defense to an action based upon a violation of the Federal Safety Appliance Acts. (Federal Safety Appliance Acts, 45 U. S. C. A. 610.)

There was no evidence from which it could be inferred that the plaintiff was in an improper position when he tried to operate the pin lifter. But even if he had been in an improper position, it had nothing to do with the happening of the accident because at the time he was injured he had gotten off the car and was running along the side when he stepped into the hole. No one contends that at the time he was injured he was improperly positioned.

In the case of *Ellis* v. *Union Pacific R. R. Co.*, 329 U. S. 649, the Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The decisions of the Supreme Court of the United States in recent years have made it clear that the jury is the arbiter of the facts in cases arising under the Federal

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Employers' Liability Act. The refusal of some courts to follow the clear mandate of the United States Supreme Court baffles explanation.

The Circuit Court of Appeals was wholly without right to review the weight of the evidence. The question before the Court was whether there was any evidence in the record supporting the verdict. The plaintiff testified that he made five or six attempts by using his utmost strength to raise the pin lifter while riding on the end of the car. After getting off of the car, and while running along the side, he made two or three other strenuous attempts to manipulate the pin lifter.

The observation in the Court's Opinion that the plaintiff was in an awkward position while he attempted to manipulate the pin lifter is an inference of the Court unsupported by evidence. But, even if it were true, it would be nothing more than contributory negligence, which, under the statute, would not be a bar to the plaintiff's claim.

The eagerness of some courts to overturn the verdicts of juries, especially in view of the recent opinions of the United States Supreme Court, seems incredible. In *Lavender* v. *Kurn*, 327 U. S. 654, 90 Law Ed. 916, the Court said:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67, 68, 87 L. Ed. 610, 617, 618, 63 S. Ct. 444, 143 A.L.R. 967; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 N.C.C.A. (N.S.) 647.

See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73."

The jury were the arbiters of the facts of the case, and the Circuit Court of Appeals acted beyond its power in substituting its opinion for that of the jury.

In the case of *Myers* v. *Reading*, 331 U. S. 477, 91 Law Ed. 1615, the Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Conclusion.

We respectfully submit that there was ample evidence in the record supporting the plaintiff's judgment. The Circuit Court of Appeals went beyond its authority and decided against the plaintiff upon a controverted question of fact.

We pray that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner.